

THE NEED FOR RESTRAINTS IN PUBLIC SCHOOLS? KEEPING STUDENTS SAFE IN THE AGE OF INCLUSION

*Deanna Arivett*¹

I.	INTRODUCTION.....	156
II.	BACKGROUND.....	158
	<i>A. History of Educating Students with Disabilities</i>	159
	<i>B. Educating Students with Behavioral Needs in their LRE</i>	160
	<i>C. Use of Restraints in Public Schools</i>	161
	<i>D. Regulating Restraints</i>	162
	1. Federal Regulation.....	162
	2. Trends in State Regulations	163
	3. Ohio Passes Comprehensive Regulations:.....	164
	a. Protections for All Students	165
	b. Defining Physical Restraints.....	165
	c. Prohibitions on Dangerous Types of Restraints.....	166
	d. Restrictions on Use	167
	e. Preventive Measures	167
	f. Notification Procedures	168
III.	ANALYSIS	168
	<i>A. There is a need for the safe use of restraints in public schools</i>	168
	1. Emergency situations require the use of restraints.....	169
	2. The use of physical restraints in schools needs to be regulated.....	170
	a. Regulations are needed to keep students and staff members safe when restraints are used.....	170
	b. Restraints should be regulated due to the need to balance overall school safety with the individual rights of children.....	171

¹ Executive Publication Editor 2014-2015, Staff Writer 2013-2014, University of Dayton Law Review. J.D., University of Dayton School of Law, 2015; Ed.S., Middle Tennessee State University, 2006; M.A., Middle Tennessee State University, 2005; B.A., Harding University, 2002. The challenges that I faced as a school psychologist, prior to law school, provided me with the personal experience and passion to write about this issue, an issue I believe needs to be discussed to protect the physical and mental health of children with behavioral needs, as well as supporting those educators who work tirelessly to educate and protect today’s youth in the challenging educational system of the twenty-first century. I would like to express my deepest appreciation to my loving husband, Brock, for all the hours that he supported me by caring for our daughter and sticking by my side. I would also like to express my sincere thanks to Professor Charles J. Russo for all the knowledge, guidance, and time he selflessly provided me throughout this process.

<i>B. Recommendations for Federal Legislative Action for the use of Restraints in Schools</i>	171
1. The Authority of Congress.....	171
2. Certain key provisions should be included in federal legislation.....	172
a. Protection for All Students.....	172
b. Defining Physical Restraints.....	173
c. Prohibitions on Dangerous Types of Restraints.....	174
d. Restrictions on Use.....	175
e. Preventative Measures.....	176
f. Notification Procedures.....	177
g. Use of Restraints in IEPs and BIPs:.....	178
IV. CONCLUSION.....	179

I. INTRODUCTION

When an elementary school principal was called to assist a first-grader, she entered the classroom and found the child screaming and shouting that he was going to run from the building. As she scanned the room, the principal saw that the child had thrown chairs and school supplies all over the room. Although the neighboring teacher had already removed the child's peers from the classroom, the crisis persisted as the child continued to scream and yell that he was going to run while attempting to throw things at the teacher who was standing in the doorway to keep the student from fleeing. Although the principal knew she might have to physically restrain the student if he could not calm down, she hoped desperately that she would not have to do so.

Unfortunately, this type of situation is all too real.² The use of physical restraints³ in crisis situations is a reality in public schools.⁴ In fact,

² See, e.g., *E.H. v. Brentwood Union Sch. Dist.*, No. C13-3243 TEH, 2013 WL 5978008, at *1 (N.D. Cal. Nov. 4, 2013) (involving use of physical restraints on a child who ran away from the school building on twenty-nine occasions, with one incident resulting in the student almost being hit by a car and then being restrained by a delivery truck driver until school personnel could arrive); see also, *S.D. v. Moreland Sch. Dist.*, No. 5:14-cv-00813-LHK, 2014 WL 3772606, at *1 (N.D. Cal. July 29, 2014) (involving a child who banged “her head on hard surfaces . . . 2-23x per day, lasting from 5 seconds to 5 minutes per incident” and “hitting her head onto others”) (internal quotation marks omitted); *Street v. District of Columbia*, 962 F. Supp. 2d 117, 119 (D.D.C. 2013) (addressing a complaint that a child was physically injured when he was pushed down by another student with severe behavioral problems). Additionally, while practicing as a school psychologist, this author has personally experienced multiple occasions where school personnel have had to quickly respond to a crisis situation due to a student engaging in behaviors which present a danger to the student or other students and staff.

³ U.S. DEPARTMENT OF EDUCATION, RESTRAINT AND SECLUSION: RESOURCE DOCUMENT 10 (2012), available at <http://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf> (“The [Civil Rights Data Collection] defines *physical restraint* as: A personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely.”); see also Darcie Ahern Mulay, Comment, *Keeping All Students Safe: The Need for Federal Standards to Protect Children from Abusive Restraint and Seclusion in Schools*, 42 STETSON L. REV. 325, 328 (2012) (differentiating

restraints and seclusion are sometimes needed to keep schools safe.⁵ Despite this need, states lack consistent protections for the use of restraints.⁶ As a result, children have experienced physical injury, psychological trauma, and even death due to the inappropriate use of physical restraints and seclusion.⁷ Further, based on a federal report, the use of restraints has resulted in at least twenty deaths.⁸ Because restraints are sometimes needed in crisis situations to keep students and staff members safe,⁹ there is a need for federal oversight to protect students from occasions when educators use inappropriate restraints in schools.¹⁰ Still, in so far as school personnel must be able to maintain safe learning environments while providing educational benefits for all students,¹¹ the use of restraints presents a challenge.

The importance of regulating restraints often comes into play when educating students with disabilities who are protected under the Individuals with Disabilities Education Act (“IDEA”).¹² Not only is school safety important,¹³ but federal law also requires school boards to provide a free appropriate public education (“FAPE”) to students with disabilities in the least restrictive environment (“LRE”).¹⁴ Serving students in LREs means that more children with challenging behaviors are present in public schools.¹⁵ Due to the sometimes-competing demands of keeping schools safe and serving students with challenging behaviors in their LREs, the use of restraints has become an increasing need in public schools.¹⁶ With an increasing need for restraints comes an increasing need for consistent

physical restraints from mechanical restraints, which involves the use of a device to restrain a student, and chemical restraints, which involves that the use of medication to control behavior).

⁴ See generally Michael Couvillon et al., *A Review of Crisis Intervention Training Programs for Schools*, 42 No. 5 TEACHING EXCEPTIONAL CHILDREN 6, 6–17 (2010), available at <https://www1.maine.gov/education/rulechanges/chapter33/022411dbutlercitreviewofrestraintsinschoolsin schools.pdf>.

⁵ *Id.* Even though seclusion practices may also be used to keep students safe in crisis situations, the use of seclusion practices is beyond the scope of this Comment.

⁶ JESSICA BUTLER, HOW SAFE IS THE SCHOOLHOUSE? AN ANALYSIS OF STATE SECLUSION AND RESTRAINT LAWS AND POLICIES 5 (2014), <http://www.autcom.org/pdf/HowSafeSchoolhouse.pdf> (last visited Mar. 18, 2015).

⁷ H.R. REP. NO. 111-417, at 1 (2010).

⁸ U.S. Gov’t Accountability Off., GAO-09-719T, *Seclusions and Restraints: Selected Cases of Death and Abuse at Public and Private Schools and Treatment Centers*: Hearing on H.R. 4247 Before the H. Comm. On Educ. & Labor, 111th Cong. (2009) (statement of Gregory Kutz, Managing Director, Forensic Audits and Special Investigations), available at <http://www.gao.gov/new.items/d09719t.pdf>.

⁹ Couvillon, *supra* note 4, at 6–17.

¹⁰ See H.R. REP. NO. 111-417, at 2 (2010); see also Mulay, *supra* note 3, at 326–27.

¹¹ See H.R. REP. NO. 111-417, at 27.

¹² Christine F. Nishimura, Note, *Eliminating the Use of Restraint and Seclusion Against Students with Disabilities*, 16 TEX. J. C.L. & C.R. 189, 202 (2011).

¹³ Safe and Drug-Free Schools and Communities Act, 20 U.S.C. § 7102 (2012).

¹⁴ Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400(e)(3), § 1412(a)(5)(A) (2012).

¹⁵ Sarah Marquez, Note, *Protecting Children with Disabilities: Amending the Individuals with Disabilities Education Act to Regulate the Use of Physical Restraints in Public Schools*, 60 SYRACUSE L. REV. 617, 628 (2010) (“In 2007, the public school system served 600,000 more special education students than it did in 1997.” (citing Benedict Carey, *Calm Down or Else*, N.Y. TIMES, July 15, 2008, at F1)).

¹⁶ *Id.*

legislation across all states regarding the safe use of restraint practices in schools.

The remainder of this Comment is divided into three sections. Section II of this Comment reviews the history of educating students with behavioral needs and the use of restraints in public schools, including regulation of the use of restraints. Specifically, this section of the Comment examines previous attempts at passing federal legislation, as well as pending federal legislation, the Keeping All Students Safe bill.¹⁷ Additionally, this section addresses overall trends in state legislation and takes a closer look at the recently passed state regulations in Ohio,¹⁸ as an example of comprehensive and meaningful legislation in the area of restraints.¹⁹

The first part of Section III of this Comment analyzes the need for the safe use of restraint practices in schools for two primary purposes. First, the use of restraints must be allowed in public schools to maintain safe learning environments.²⁰ Second, due to the risks associated with the use of physical restraints, such as the risk of physical injury to the student,²¹ federal regulations are needed to minimize the use of restraints and to keep students and staff safe when restraints are used.²²

The second part of Section III provides recommendations for federal legislation regarding the use of restraints in schools. The goal of these recommendations is to provide guidance on the minimum safety standards that should be included in federal legislation. Since “[t]here is no universally accepted definition of the term ‘physical restraint,’”²³ this part of the Comment makes recommendations regarding the practices and techniques which should and should not be considered in a definition of “physical restraint.” In addition, these recommendations review which types of restraint practices should be prohibited and what additional safety measures should be required. Lastly, this Comment rounds out in a brief conclusion in Section IV.

II. BACKGROUND

This background section discusses the significant changes and

¹⁷ Keeping All Students Safe Act, H.R. 927, 114th Cong. (2015); Keeping All Students Safe Act, H.R. 1893, 113th Cong. (2013); Keeping All Students Safe Act, S. 2020, 112th Cong. (2011); Keeping All Students Safe Act, H.R. 1381, 112th Cong. (2011); Keeping All Students Safe Act, H.R. 4247, 111th Cong. (2009).

¹⁸ See generally OHIO ADMIN. CODE 3301-35-15 (2014).

¹⁹ BUTLER, *supra* note 6, at app. Does State Have A Law Providing Meaningful Protections and Who Does It Cover?.

²⁰ Marquez, *supra* note 15, at 628.

²¹ David Allen, *Risk and Prone Restraint: Reviewing the Evidence*, in FOR OUR OWN SAFETY: EXAMINING THE SAFETY OF HIGH-RISK INTERVENTIONS FOR CHILDREN AND YOUNG PEOPLE 87 (Michael A. Nunno, David M. Day, & Lloyd B. Bullard eds., 2008).

²² See H.R. REP. NO. 111-417, at 2 (2010).

²³ Marquez, *supra* note 15, at 620.

improvements in the education of students with behavioral needs over the last sixty to seventy years. These changes primarily occurred due to the passage of federal legislation that requires states to educate students with disabilities in the LRE. Because students with behavioral needs are now served in many public schools across the country, the use of physical restraints are sometimes needed to keep students and staff safe. Despite this need to use physical restraints, there is no federal legislation on the use of restraints, and although there have been recent improvements in state legislation, such as Ohio's recent regulations, states continue to lack consistent legislation to protect students and staff when restraints are used. This section takes a brief look at the history surrounding this issue, and the recent trends in state and federal legislation.

A. History of Educating Students with Disabilities

Since the 1950s, the delivery of education for students with disabilities, including behavioral disabilities, has improved substantially.²⁴ Before 1975, the education for students with disabilities had been largely left to the states.²⁵ Yet, many states had failed to allow students with disabilities to attend public school, and for those that did provide public education for students with disabilities, many allowed these students to “fend for themselves in classrooms” and eventually drop out of school.²⁶

In 1975, Congress passed the Education for all Handicapped Children Act, later to be called the IDEA.²⁷ As a condition for receiving federal funding, states were required to provide a FAPE to all students with disabilities.²⁸ The IDEA continues to require states to provide students with disabilities a FAPE.²⁹ The FAPE requirement is satisfied “by providing personalized instruction with sufficient support services to permit the child

²⁴ GRAD L. FLICK, UNDERSTANDING AND MANAGING EMOTIONAL AND BEHAVIOR DISORDERS IN THE CLASSROOM 26 (Pearson eds., 2011). The percentage of students with disabilities attending school increased from 12% in 1948 to 78.5% in 1974. STEPHEN B. THOMAS & CHARLES J. RUSSO, SPECIAL EDUCATION LAW: ISSUES & IMPLICATIONS FOR THE '90S 5 (1995).

²⁵ Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176, 191 (1982); see also FREDERICK J. WEINTRAUB & JOSEPH BALLARD, THE COUNCIL FOR EXCEPTIONAL CHILDREN, SPECIAL EDUCATION IN AMERICA: ITS LEGAL AND GOVERNMENTAL FOUNDATIONS 1–5 (Joseph Ballard et al. eds., 1982) (discussing some federal legislation supporting the education of students with disabilities prior to 1975).

²⁶ Rowley, 458 U.S. at 191 (providing data showing that approximately “1.75 million handicapped children [did] not receive any educational services, and 2.5 million handicapped children [did] not receiv[e] an appropriate education”) (citation omitted).

²⁷ CHARLES J. RUSSO, REUTER'S THE LAW OF PUBLIC EDUCATION 1065 (8th ed. 2012).

²⁸ Rowley, 458 U.S. at 180–81.

²⁹ 20 U.S.C. § 1412(a)(1)(A) (2012); see also 20 U.S.C. § 1401(9) (2012) (“The term ‘free appropriate public education’ means special education and related services that— (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.”).

to benefit educationally from that instruction.”³⁰ Additionally, a FAPE must be provided in a student’s LRE, where a regular classroom setting in the child’s home school is the least restrictive setting possible.³¹

B. Educating Students with Behavioral Needs in their LRE

Before the mid-1950s, students with behavioral disorders were among other students with disabilities that were segregated from the public school setting and educated in separate facilities.³² Beginning in the mid-1950s, the profession began to recognize the importance of behavioral interventions to better meet the needs of these students.³³ Due to these changes in serving students with behavioral needs and the passage of IDEA, the majority of these students are now served in public school settings.³⁴ Although these changes have significantly improved the education of students with behavioral disabilities, serving children with severe behavioral needs in the public school setting has also led to an increase in the use of restraints in public schools.³⁵ Although an increase in restraints can be considered troubling, some have argued that the ability to use restraints in public schools makes it possible for some students to remain in the least restrictive school setting possible (i.e., the public school setting).³⁶

Moreover, parents and school personnel do not always agree on a change of placement when a child’s behavior becomes highly challenging in the public school setting.³⁷ The goal under IDEA is to serve children in the general education setting whenever possible;³⁸ therefore, when a disagreement arises and school personnel believe that a child cannot be safely served in the public school setting, parents must be afforded procedural requirements under IDEA. This can make it difficult to change the placement of students with highly challenging behaviors to a more restrictive setting outside of the regular public school.³⁹

³⁰ *Rowley*, 458 U.S. at 203.

³¹ 20 U.S.C. § 1412(a)(5)(A) (2012). “To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” *Id.*

³² FLICK, *supra* note 24, at 26.

³³ *Id.*

³⁴ *Id.*

³⁵ *See* Mulay, *supra* note 3, at 328.

³⁶ SASHA PUDELSKI, AM. ASS’N. OF SCH. ADM’RS., KEEPING SCHOOLS SAFE: ENSURING FEDERAL POLICY SUPPORTS SCHOOL SAFETY 11 (2012), available at http://www.aasa.org/uploadedFiles/Policy_and_Advocacy/AASA-July-2012-Keeping-Schools-Safe.pdf.

³⁷ ALLAN G. OSBORNE, JR. & CHARLES J. RUSSO, DISCIPLINE IN SPECIAL EDUCATION 86 (Corwin eds., 2009).

³⁸ Julie F. Mead, *Expressions of Congressional Intent: Examining the 1997 Amendments to the IDEA*, 127 ED. LAW REP. 511, 515–16 (Sept. 1998).

³⁹ *Id.*

Among the many procedural safeguards given to parents of children with disabilities, parents may contest a school board's proposed change in placement to a more restrictive setting through procedures such as a due process hearing.⁴⁰ If the parent or district file a due process complaint due to a dispute, "stay-put" goes into effect for the duration of the due process proceeding, meaning that the child remains in his current placement (e.g., the public school) until the hearing officer makes a determination regarding the dispute, unless the parent and district agree to a change in placement.⁴¹

When the parent disagrees with the change in placement, regulations require that school officials be able to show that the child is actually dangerous before school officials can unilaterally exclude him from the public school setting.⁴² "[M]ere allegations of dangerousness are insufficient."⁴³ Additionally, the district must also demonstrate that it has implemented behavioral measures that failed to address the student's educational needs.⁴⁴ Therefore, it can be difficult for schools to quickly change the placement of a child with highly challenging and potentially dangerous behaviors.

C. Use of Restraints in Public Schools

School boards have "a compelling interest in protecting the welfare and safety of" students.⁴⁵ Due to this duty to keep students safe, there are times when school personnel need to use physical restraints on students whose behavior presents safety risks.⁴⁶ On the other hand, because of the risks associated with the use of restraints, safety restrictions are important to ensure that restraints are only used as a last resort in crisis situations.⁴⁷

Regarding students with disabilities, IDEA fails to address the use of restraints.⁴⁸ Instead, the use of restraints is left up to the states.⁴⁹ Even so, the Federal Department of Education has stated that any use of restraint must be consistent with provisions in the child's individual education plan ("IEP") and the IEP team must have considered the use of positive behavioral interventions.⁵⁰

⁴⁰ OSBORNE, JR. & RUSSO, *supra* note 37, at 87.

⁴¹ 20 U.S.C. § 1415(j) (2012).

⁴² OSBORNE, JR. & RUSSO, *supra* note 37, at 90.

⁴³ *Id.*

⁴⁴ *Id.* at 93.

⁴⁵ *Cheema v. Thompson*, 67 F.3d 883, 889 (9th Cir. 1995) (Wiggins, J., dissenting).

⁴⁶ Allan G. Osborne, Jr., *Are Existing Controls Sufficient to Prevent the Overuse and Abuse of Seclusion and Physical Restraint in the Discipline of Students with Disabilities? Overview*, in 5 *SCHOOL DISCIPLINE AND SAFETY* 211 (Suzanne E. Eckes & Charles J. Russo eds., 2012).

⁴⁷ Marquez, *supra* note 15, at 634.

⁴⁸ Mulay, *supra* note 3, at 340.

⁴⁹ BUTLER, *supra* note 6, at 5.

⁵⁰ Nancy Lee Jones & Jody Feder, *The Use of Seclusion and Restraint in Public Schools: The Legal Issues*, in *TIME OUT: EXAMINING SECLUSION AND RESTRAINT IN SCHOOLS* 114 (Laura E. Kentley ed., Nova Science Publishers, Inc. 2010).

D. Regulating Restraints

Despite multiple attempts to pass federal legislation requiring states to have minimum safety regulations for the use of restraints in schools, no federal legislation has been passed. Additionally, trends in state regulation range from nonexistent to comprehensive. One such state to recently pass comprehensive regulations is Ohio. As such, Ohio's regulations can serve as a model for federal regulation for the use of restraints in schools.

1. Federal Regulation

Despite the fact that inappropriate use of restraints can be dangerous, there is currently no federal oversight concerning the use of restraints, notwithstanding three failed attempts to pass federal legislation.⁵¹ Since 2009, members of Congress have introduced bills during each of the last four consecutive sessions that would provide regulations for the use of restraints in schools.⁵² Most recently, Representative Donald Beyer of Virginia reintroduced a bill, H.R. 927, titled the Keeping All Students Safe Act, to the 114th Congress on February 12, 2015.⁵³ On April 29, 2015, the bill was sent to the Subcommittee on Early Childhood, Elementary, and Secondary Education, where it remains at the time of this Comment.⁵⁴

If Congress were to pass the Keeping All Students Safe Act, this law would require the Department of Education to provide minimum standards for the use of restraints in schools.⁵⁵ Specifically, H.R. 927 prohibits the use of mechanical restraints, chemical restraints, and any physical restraint that restricts a child's breathing; limits the use of physical restraints to situations of imminent danger to the safety of the student or others; requires a "sufficient number" of school staff to be trained in the use of crisis intervention and behavior management techniques; prohibits including the use of restraints into a student's educational, behavioral, or crisis plan; and requires parental notification for incidents in which restraints are used on a child.⁵⁶ Although similar to H.R. 927, a previous bill from the 113th Congress, S. 2036, had some variations, highlighting some of the disputes regarding the use of restraints.⁵⁷ One major variation was

⁵¹ BUTLER, *supra* note 6, at 1; *H.R. 1893 – Keeping All Students Safe Act Committees*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr1893> (last visited May 10, 2015).

⁵² Keeping All Students Safe Act, H.R. 927, 114th Cong. (2015); Keeping All Students Safe Act, S. 2036, 113th Cong. (2014); Keeping All Students Safe Act, H.R. 1893, 113th Cong. (2013); Keeping All Students Safe Act, H.R. 1381, 112th Cong. (2011); Keeping All Students Safe Act, S. 2020, 112th Cong. (2011); Keeping All Students Safe Act, H.R. 4247, 111th Cong. (2009).

⁵³ *H.R. 927 – Keeping All Students Safe Act Summary*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/927> (last visited May 10, 2015).

⁵⁴ *H.R. 927 – Keeping All Students Safe Act Committees*, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/927/committees> (last visited May 10, 2015).

⁵⁵ Keeping All Students Safe Act, H.R. 927, 114th Cong. § 5 (2015).

⁵⁶ *Id.*

⁵⁷ Compare Keeping All Students Safe Act, S. 2036, 113th Cong. (2014), with H.R. 927, 114th Cong. (2015).

that S. 2036 allowed educational teams to include the use of restraints into an individual student's plan if certain preventative measures were in place and if the state allowed such use.⁵⁸ Until Congress passes such measures, regulation on the use of restraints in schools remains in the hands of the states.⁵⁹

2. Trends in State Regulations

State legislation for regulating the use of restraints in schools runs the spectrum from comprehensive to nonexistent.⁶⁰ As of January 2014, twenty-one states had meaningful state legislation;⁶¹ twelve had meaningful legislation for students with disabilities only; six states had weak legislation;⁶² six states had only provided guidance on the use of restraints;⁶³ and six states continued to have no legislation or guidance of any kind to guide schools in their use of restraints.⁶⁴ Therefore, thirty states failed to provide meaningful restraint laws to keep all students safe.⁶⁵

[Chart 1 on next page]

⁵⁸ Keeping All Students Safe Act, S. 2036, 113th Cong. (2014).

⁵⁹ BUTLER, *supra* note 6, at 1.

⁶⁰ *Id.*

⁶¹ *Id.* at app. Does State Have A Law Providing Meaningful Protections and Who Does It Cover?. “To provide meaningful protection, a state has to fall in one of two categories. One, it provides multiple protections against restraint . . . for students. Two, it has few protections but strictly limits the technique to emergency threats of physical harm. This designation does not necessarily mean that a state’s laws provide sufficient protection . . .” *Id.* at 8 n.17.

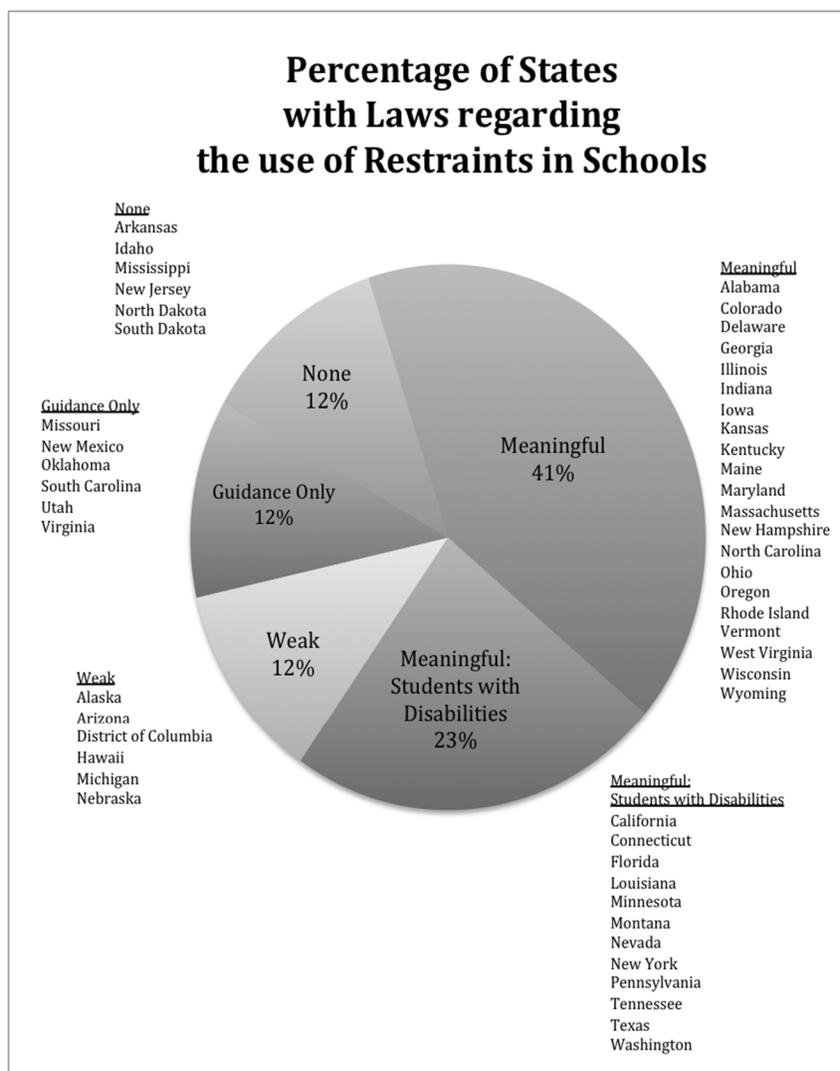
⁶² *See id.* at app. Does State Have A Law Providing Meaningful Protections and Who Does It Cover?; *see also id.* at 9 (providing such “limited, weak protections” that they were unable to fall within the category of meaningful protections).

⁶³ *Id.* at app. Does State Have A Law Providing Meaningful Protections and Who Does It Cover?; *see also id.* at 10 (providing “voluntary guidelines or policies that impose no mandatory legal obligation”).

⁶⁴ *Id.* at 11, 58–64, app. Does State Have A Law Providing Meaningful Protections and Who Does It Cover?.

⁶⁵ *Id.* at 58–64.

Chart 1



66

3. Ohio Passes Comprehensive Regulations:

Ohio is among a growing number of jurisdictions that have recently passed legislation regulating the use of restraints in schools.⁶⁷ Ohio's

⁶⁶ *Id.*

⁶⁷ JESSICA BUTLER, HOW SAFE IS THE SCHOOLHOUSE? AN ANALYSIS OF STATE SECLUSION AND RESTRAINT LAWS AND POLICIES 1, 3 (2013),

regulations, the “[s]tandards for the implementation of positive behavior intervention supports and the use of restraint and seclusion,” became effective August 1, 2013.⁶⁸

Ohio’s regulations for the use of restraints provide meaningful protection because they “provide[] multiple protections against restraint . . . for students.”⁶⁹ Specifically, Ohio’s regulations provide the following protections, which will be discussed in detail below. First, Ohio’s regulations protect all students, not just students with disabilities.⁷⁰ Second, Ohio’s definition of physical restraint communicates what actions fall within the definition of physical restraint, as well as what actions fall outside the definition.⁷¹ Third, dangerous types of physical restraints are prohibited.⁷² Fourth, measures are included to ensure the use of restraints is safe, such as only allowing the use of restraints in crisis situations.⁷³ Fifth, the regulations mandate preventative measures, such as positive behavior intervention supports (“PBIS”) and staff training.⁷⁴ Sixth, notification measures are in place to notify supervisors and parents when restraint procedures are used.⁷⁵ Each of these components is now addressed separately.

a. Protections for All Students

Ohio’s regulations apply to all students.⁷⁶ Unlike some states that only regulate the use of restraints for students with disabilities,⁷⁷ Ohio’s regulations apply to all students regardless of whether they have been identified as disabled, thereby, providing protections to all students.⁷⁸

b. Defining Physical Restraints

At the same time, Ohio provides an extensive definition of physical

<http://www.wrightslaw.com/info/Howsafeschoolhouse.may2013.pdf> (discussing the increase in new laws, and revisions to existing laws, that have “significantly increase[d] protections” for students “[s]ince the first Congressional bill was introduced by Congressman Miller in late 2009”). For example, “[i]n 2013, several states adopted or revised significant statutes and/or regulations, including Delaware, Indiana, Kansas, Kentucky, Maine, Minnesota, Ohio, Oregon, and Washington.” BUTLER, *supra* note 6, at 6.

⁶⁸ OHIO ADMIN. CODE 3301-35-15 (2014).

⁶⁹ BUTLER, *supra* note 6, at 8 n.17, 62, app. Does State Have A Law Providing Meaningful Protections and Who Does It Cover?.

⁷⁰ See generally OHIO ADMIN. CODE 3301-35-15.

⁷¹ *Id.* at (A)(6).

⁷² *Id.* at (C), (D).

⁷³ *Id.* at (D).

⁷⁴ *Id.* at (B), (G).

⁷⁵ *Id.* at (F).

⁷⁶ See generally OHIO ADMIN. CODE 3301-35-15 (2014).

⁷⁷ BUTLER, *supra* note 6, at 8, app. Does State Have A Law Providing Meaningful Protections and Who Does It Cover? (including California, Connecticut, Florida, Louisiana, Minnesota, Montana, Nevada, Pennsylvania, Tennessee, and Texas).

⁷⁸ See generally OHIO ADMIN. CODE 3301-35-15 (2014); BUTLER, *supra* note 6, at app. Does State Have A Law Providing Meaningful Protections and Who Does It Cover?.

restraint including which behaviors fall outside the scope of the definition.⁷⁹ The regulation defines physical restraint as “the use of physical contact in a way that immobilizes or reduces the ability of an individual to move the individual’s arms, legs, body, or head freely.”⁸⁰ Specifically excluded from the definition of physical restraint are physical escorts, mechanical restraints, and chemical restraints.⁸¹ Additionally, brief physical contact is also excluded from the definition.⁸² This includes contact used:

(a) [t]o break up a fight; (b) [t]o knock a weapon way from a student’s possession; (c) [t]o calm or comfort; (d) [t]o assist a student in completing a task/response if the student does not resist the contact; or (e) [t]o prevent an impulsive behavior that threatens the student’s immediate safety (e.g., running in front of a car).⁸³

c. Prohibitions on Dangerous Types of Restraints

Ohio regulations prohibit the use of the following types of restraint under any circumstances: prone restraints; chemical restraints; mechanical restraints; and

Any form of physical restraint that involves the intentional, knowing, or reckless use of any technique that: (a) involves the use of pinning down a student by placing knees to the torso, head, or neck of the student; (b) uses pressure point, pain compliance, or joint manipulation techniques; or (c) otherwise involves techniques that are used to unnecessarily cause pain.⁸⁴

Ohio regulations also specifically prohibit the use of any restraint that obstructs a student’s airway or ability to communicate.⁸⁵ Any type of restraint that restricts a child’s breathing is considered highly dangerous.⁸⁶ For example, prone restraints, which put a child in a “face-down position for an extended period of time,” are known to be extremely dangerous and have

⁷⁹ OHIO ADMIN. CODE 3301-35-15(A)(6) (2014).

⁸⁰ *Id.*

⁸¹ *Id.*; see also *id.* at (A)(5) (“Physical escort” means the temporary touching or holding of the hand, wrist, arm, shoulder, waist, hip, or back for the purpose of inducing a student to move to a safe location.”); *id.* at (A)(3)(a) (defining a mechanical restraint as “[a]ny method of restricting a student’s freedom of movement, physical activity, or normal use of the student’s body by using an appliance or device manufactured for this purpose”); *id.* at (A)(2) (describing that a chemical restraint involves the use of a drug or medication to “control a student’s behavior or restrict freedom of movement” when the drug or medication is not “[p]rescribed by a licensed physician . . . and administered as prescribed by the licensed physician”).

⁸² *Id.* at (A)(6).

⁸³ *Id.*

⁸⁴ *Id.* at (C).

⁸⁵ *Id.* at (D)(2).

⁸⁶ U.S. DEPARTMENT OF EDUCATION, *supra* note 3, at 16.

even resulted in death.⁸⁷

On the other hand, Ohio specifically excludes from the prohibition against mechanical restraints any “device used by trained school personnel, or used by a student, for the specific and approved therapeutic or safety purpose for which the device was designed”⁸⁸ Therefore, devices used for therapeutic and safety purposes do not fall under the prohibition of mechanical restraints.⁸⁹

d. Restrictions on Use

Ohio regulations include additional safety measures.⁹⁰ For example, physical restraints can only be used if a “student’s behavior poses an immediate risk of physical harm to the student or others and no other safe or effective intervention is available”⁹¹ Therefore, physical restraints can only be used in crisis situations.⁹² In addition, physical restraints cannot be used solely to prevent children from destroying property.⁹³ Ohio regulations also make clear that a “[p]hysical restraint may not be used for punishment or discipline” purposes.⁹⁴ These additional safety measures ensure that restraints are only used as a last resort in crisis situations.⁹⁵

e. Preventive Measures

Ohio promotes the goal of prevention when dealing with challenging student behaviors.⁹⁶ Regulations require that each school board in Ohio implement PBIS system-wide.⁹⁷ The goal of PBIS is to increase positive behaviors, thereby decreasing negative behaviors that can lead to the use of restraints.⁹⁸ Another prevention method includes the training and professional development of school staff.⁹⁹ Regulations encourage training school staff on the use of PBIS and require training for “an appropriate number of personnel in each building” in the area of crisis management,

⁸⁷ OHIO ADMIN. CODE 3301-35-15(A)(8) (2014); Mulay, *supra* note 3, at 331.

⁸⁸ OHIO ADMIN. CODE 3301-35-15(A)(3)(b)(i-iii) (2014) (“[I]ncluding: (i) [r]estraints for medical immobilization; (ii) [a]daptive devices or mechanical supports used to allow greater freedom of mobility than would be possible without the use of such devices or mechanical supports; or (iii) [v]ehicle safety restraints when used as intended during the transportation of a student in a moving vehicle.”).

⁸⁹ *Id.* at (A)(3)(b).

⁹⁰ *Id.* at (D).

⁹¹ *Id.* at (D)(2)(a).

⁹² *See id.*

⁹³ *See id.*

⁹⁴ *Id.* at (D)(3).

⁹⁵ *See id.* at (D).

⁹⁶ *Id.* at (B), (G).

⁹⁷ *Id.* at (B); *id.* at (A)(7) (defining PBIS in Ohio as “[a] school-wide systematic approach to embed evidence-based practices and data-driven decision making to improve school climate and culture in order to achieve improved academic and social outcomes, and increase learning for all students, and that . . . [e]ncompasses a range of systemic and individualized positive strategies to reinforce desired behaviors, diminish reoccurrences of challenging behaviors, and teach appropriate behaviors to students”).

⁹⁸ *See* OHIO ADMIN. CODE 3301-35-15 (A)(7) (2014).

⁹⁹ *Id.* at (G).

including de-escalation strategies.¹⁰⁰

f. Notification Procedures

Notification procedures are required to inform administrators and parents of the use of restraints.¹⁰¹ Regulations require that staff members “immediately” notify their building supervisors of all incidents that involve the use of a restraint on a child.¹⁰² Parents must also receive immediate notification followed by a written report “within twenty-four hours” documenting the incident of restraint.¹⁰³ Moreover, regulations provide parents the opportunity to file a written complaint to the superintendent of a district to initiate an investigation into a specific incident.¹⁰⁴ District officials must then provide written responses to parents regarding investigations within thirty days of any complaints.¹⁰⁵

As established in this section of the Comment, states continue to lack consistent regulations to provide meaningful protections for students and staff when physical restraints are used in schools. Because students with behavioral needs are frequently served in public school settings, the need for consistent regulation remains. Despite the lack of consistency, some states, such as Ohio, have recognized the need to keep students and staff safe by recently passing comprehensive regulations for the use of restraints in schools.

III. ANALYSIS

Section III addresses the need for safe restraints and then recommends minimum provisions for federal legislation. As addressed below, schools experience emergency situations with students that sometimes require the use of physical restraints. Because restraints are sometimes needed, it is important that the use of restraints be meaningfully regulated to keep students and staff safe when restraints are used. Therefore, federal regulation is needed to provide children with consistent protection across all states. Due to the need for meaningful legislation, specific federal legislative provisions are recommended.

A. There is a need for the safe use of restraints in public schools

Restraints are sometimes needed to keep students and staff safe in crisis situations.¹⁰⁶ “It is not uncommon for a student to exhibit frequent

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at (F).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at (H)(1).

¹⁰⁵ *Id.* at (H)(2).

¹⁰⁶ *See* Couvillon, *supra* note 4, at 8.

behaviors that may necessitate a physical restraint while the student deals with a crisis, a transition, or a cycle of behavior.”¹⁰⁷ When a student becomes physically out of control, it can be too late to implement other interventions.¹⁰⁸ Though restraints may be needed during these emergency situations, their use should be regulated to insure that they are only used when absolutely necessary and with appropriate safety precautions.¹⁰⁹

1. Emergency situations require the use of restraints

School boards have “a compelling interest in protecting the welfare and safety” of students.¹¹⁰ Due to this compelling interest, there are times when school personnel need to use physical restraints on students whose behavior presents safety risks.¹¹¹ Although some have argued that restraints should be completely prohibited in schools because they fail to change behavior,¹¹² this is not, and should not be, the goal of restraints.¹¹³ Instead, the goal of restraints is to safely eliminate the threat of harm only after other less restrictive attempts have failed.¹¹⁴ Moreover, restraints are not a form of discipline.¹¹⁵ The use of restraints is not effective for correcting behavior; therefore, it is inappropriate as a method of discipline.¹¹⁶

Teachers and staff members in public schools clearly face behaviors that pose a risk of imminent harm, most commonly from students with developmental or emotional disabilities.¹¹⁷ Failing to use physical restraints in crisis situations, thereby allowing harm to come to students or staff, would be irresponsible.¹¹⁸ Thus, completely prohibiting the use of restraints would keep school personnel from using their professional judgment to reduce the risk of harm to students and staff in crisis situations.¹¹⁹

In addition, the argument that PBIS will completely eliminate *all* dangerous behaviors is a hollow assumption without support.¹²⁰ Although PBIS can significantly decrease incidents of dangerous behaviors and should be used as a preventative measure to teach students appropriate behavior and reduce the overall occurrence of inappropriate behavior, it will not eliminate

¹⁰⁷ PUDELSKI, *supra* note 36, at 11.

¹⁰⁸ Cali Cope-Kasten, Note, *It's Time to Start Showing a Little Restraint: In Search of a Compromise on Federal Seclusion and Restraint Legislation*, 47 U. MICH. J.L. REFORM 217, 223 (2013).

¹⁰⁹ H.R. REP. NO. 111-417, at 2 (2010).

¹¹⁰ *Cheema v. Thompson*, 67 F.3d 883, 889 (9th Cir. 1995) (Wiggins, J., dissenting).

¹¹¹ Osborne, Jr., *supra* note 46, at 211.

¹¹² Nishimura, *supra* note 12, at 231.

¹¹³ V. Susan Villani, Aaron E. Parsons, Robin P. Church, & John T. Beetar, *A Descriptive Study of the Use of Restraint and Seclusion in a Special Education School*, 41 CHILD YOUTH CARE FORUM 295, 307 (2012).

¹¹⁴ *See id.*

¹¹⁵ OSBORNE, JR. & RUSSO, *supra* note 37, at 104.

¹¹⁶ Cope-Kasten, *supra* note 109, at 224.

¹¹⁷ Mulay, *supra* note 3, at 333.

¹¹⁸ Osborne, Jr., *supra* note 46, at 211.

¹¹⁹ Marquez, *supra* note 15, at 634.

¹²⁰ Nishimura, *supra* note 12, at 229–30.

all challenging behaviors.¹²¹ For instance, behavioral interventions may fail to eliminate challenging behaviors that stem from psychiatric problems or other disabilities.¹²²

Additionally, since dangerous situations will likely occur in the public school setting prior to removal of students with highly challenging behaviors,¹²³ schools may need to use restraints in emergency situations.¹²⁴ Completely eliminating the use of physical restraints in schools would likely have a negative impact on the ability of public schools to adequately service students whose behavioral needs occasionally cross the line of safety, thereby forcing schools to change the placement of students to more restrictive settings.¹²⁵

2. The use of physical restraints in schools needs to be regulated.

There is a need for comprehensive regulations on the use of restraints in schools.¹²⁶ Restraints should be regulated for two primary reasons. First, regulations can provide safety measures to keep students and staff safe when restraints are used.¹²⁷ Second, because physical restraints impede on the constitutional rights of students to be free from bodily restraints,¹²⁸ they should be regulated so they are only used when the duty of school officials to keep schools safe outweighs the individual rights of a student. Both of these reasons are discussed in detail below.

a. Regulations are needed to keep students and staff members safe when restraints are used

Because there are risks associated with the use of physical restraints, regulations should be put into place to reduce those risks.¹²⁹ By intervening physically to control a student's dangerous behavior, both the student receiving the restraint and the person providing the restraint are at risk of physical injury.¹³⁰ Moreover, when dangerous types of restraints are used, the risk of physical harm and death increases.¹³¹ In addition to physical risks of injury or death, students may experience emotional trauma due to

¹²¹ U.S. DEPARTMENT OF EDUCATION, *supra* note 3, at 3; Couvillon, *supra* note 4; *see, e.g.*, BUTLER, *supra* note 6, at 26 (reporting that one school district's "crisis level behaviors fell by 78 percent" after implementing PBIS and another school district's use of "physical restraints fell by 69 percent" six months after implementing a PBIS program).

¹²² *See* Villani, *supra* note 114, at 307.

¹²³ *See* OSBORNE, JR. & RUSSO, *supra* note 37, at 90.

¹²⁴ Couvillon, *supra* note 4, at 8.

¹²⁵ *See* Marquez, *supra* note 15, at 628; *see also* PUDELSKI, *supra* note 36, at 11.

¹²⁶ Mulay, *supra* note 3, at 330.

¹²⁷ H.R. REP. NO. 111-417, at 2 (2010).

¹²⁸ Nishimura, *supra* note 12, at 220.

¹²⁹ *See* Couvillon, *supra* note 4; *see also* H.R. REP. NO. 111-417, at 2.

¹³⁰ Allen, *supra* note 21, at 87.

¹³¹ *See, e.g.*, BUTLER, *supra* note 6, at 4.

the use of restraints.¹³² These risks alone provide a need for regulation.

b. Restraints should be regulated due to the need to balance overall school safety with the individual rights of children

The duty of school officials to keep students safe can conflict with the constitutional right of a child with behavioral needs.¹³³ For example, the constitutional right of a child with a disability to be free from bodily restraints may conflict with the interest of the state to protect the safety of others.¹³⁴ Therefore, school officials must sometimes weigh the rights of an individual child against the broader interests of the state.

Due to these challenges, legal precedent has been established to assist school officials in meeting the needs of the state to maintain a safe learning environment. One well-established standard is that “students enjoy fewer [constitutional] rights . . . than children outside the classroom.”¹³⁵ In determining the appropriate balance between school safety and individual rights of a child, school officials are allowed to use professional judgment in deciding the need for restraints as long as that judgment does not substantially depart from acceptable professional judgment.¹³⁶ Because standards for the use of restraints are not consistent from state to state, comprehensive regulations for the use of restraints are needed to provide additional guidance regarding the acceptable professional standard for educators faced with these challenging decisions.

B. Recommendations for Federal Legislative Action for the use of Restraints in Schools

The lack of meaningful legislation in thirty states demonstrates the need for federal regulations.¹³⁷ At a minimum, federal legislation should provide key safety standards and require states to implement comprehensive state regulations.¹³⁸

1. The Authority of Congress

The power of Congress to regulate restraints in schools comes from the Constitution of the United States, Article I, Section 8, Clause 1.¹³⁹ The

¹³² *Id.* at 4–5.

¹³³ Allison A. Howland, *In Loco Parentis: Should Teachers Take the Place of Parents in All School Disciplinary Matters? Counterpoint*, in 5 SCHOOL DISCIPLINE AND SAFETY 204 (Suzanne E. Eckes & Charles J. Russo eds., 2012).

¹³⁴ *Youngberg v. Romeo*, 457 U.S. 307, 319–21 (1982).

¹³⁵ *Cheema v. Thompson*, 67 F.3d 883, 892 (9th Cir. 1995) (Wiggins, J., dissenting).

¹³⁶ *Youngberg*, 457 U.S. at 323.

¹³⁷ BUTLER, *supra* note 6, at 58–64, app. chart Does State Have A Law Providing Meaningful Protections and Who Does It Cover?; *see also* Mulay, *supra* note 3, at 327.

¹³⁸ Mulay, *supra* note 3, at 368.

¹³⁹ H.R. REP. NO. 111-417, at 26 (2010).

General Welfare Clause in Article 1, Section 8, Clause 1 provides Congress the authority "[t]o lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."¹⁴⁰ "Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'"¹⁴¹ Therefore, by attaching federal funding to restraint regulations, Congress has the authority to set minimum standards for the general welfare of the nation.

2. Certain key provisions should be included in federal legislation

Federal oversight is needed to provide states with minimum safety standards for the use of restraints in schools. Despite their infancy, Ohio's regulations can serve as a model for other legislation because they include comprehensive restraint regulation.¹⁴² Ohio's regulations for the use of restraints provide comprehensive protection because they "provide multiple protections against restraint . . . for [all] students."¹⁴³

It is also important that regulations take into consideration the unique challenges of a school environment.¹⁴⁴ Along with comprehensive restraint protections, Ohio's regulations address these unique challenges. Using Ohio's regulations as a model, it is recommended that several components be included in federal legislation.

a. Protection for All Students

Federal regulations should apply to all children, not just students with disabilities.¹⁴⁵ Although restraints are most commonly used with children with disabilities,¹⁴⁶ situations may occur that require the use of

¹⁴⁰ U.S. CONST. art. I, § 8, cl. 1.

¹⁴¹ *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 474 (1980)).

¹⁴² BUTLER, *supra* note 6, at 62, app. Does State Have A Law Providing Meaningful Protections and Who Does It Cover?.

¹⁴³ *Id.* at 8 n.17, app. Does State Have A Law Providing Meaningful Protections and Who Does It Cover?.

¹⁴⁴ H.R. REP. NO. 111-417, at 2 (2010); *see also* Villani, *supra* note 114, at 305–06 ("Special education settings differ from hospitals to residential treatment centers in that medication for periodic agitation, both oral and intramuscular, generally are not given. Despite aggressive or self-injurious behaviors, students must be available to attend class and ride safely to and from home on a school bus or other means of transportation. Although crisis behaviors may be similar regardless of site—hospital, residential treatment center, or school—the management of dangerous behaviors in a school setting is different.").

¹⁴⁵ *See* BUTLER, *supra* note 6, at 7.

¹⁴⁶ Mulay, *supra* note 3, at 327–28.

restraints on general education students.¹⁴⁷ Since all children, including those in general education, should be afforded the protection of regulations,¹⁴⁸ it would be inadequate just to amend IDEA to provide regulations for restraints, as some have suggested.¹⁴⁹ Since many states currently only regulate restraints used with students with disabilities,¹⁵⁰ this would expand protections to general education students as well.

b. Defining Physical Restraints

Since there is no universal definition for restraint,¹⁵¹ legislatures must provide a definition of physical restraint.¹⁵² This is extremely important as the definition of restraint used in legislation ultimately determines what activities are and are not regulated.¹⁵³ A general definition for physical restraint is “[a] personal restriction that immobilizes or reduces the ability of a student to move his or her torso, arms, legs, or head freely.”¹⁵⁴

Because a general definition of physical restraints can encompass a wide variety of activities, the definition of physical restraints should exclude certain types of physical contact that should not be regulated, such as brief physical contact.¹⁵⁵ For example, beneficial physical contact, such as holding a student’s wrist or assisting a student with a task, should not be subject to the restrictions for physical restraints because these types of contact do not present the risks associated with the use of restraints.¹⁵⁶ Additionally, other types of brief physical contact, such as breaking up a fight between students, knocking a weapon out of a student’s hand, or preventing a student from walking in front of a car, may be needed in a crisis situation but do not fall into the same category as the use of a prone restraint.¹⁵⁷

The definition of physical restraints should also exclude therapeutic physical contact.¹⁵⁸ Many students with sensory needs require daily sensory

¹⁴⁷ Michelle Gough McKeown, *Are Existing Controls Sufficient to Prevent the Overuse and Abuse of Seclusion and Physical Restraint in the Discipline of Students with Disabilities? Counterpoint*, in 5 SCHOOL DISCIPLINE AND SAFETY 227 (Suzanne E. Eckes & Charles J. Russo eds., 2012).

¹⁴⁸ See BUTLER, *supra* note 6, at 7.

¹⁴⁹ See Jeffrey P. Miller, Note, *Physical Education: Amending the Individuals with Disabilities Education Act to Restrict Restraint and Seclusion in Public and Private Schools*, 49 FAM. CT. REV. 400, 401 (2011).

¹⁵⁰ BUTLER, *supra* note 6, at 1.

¹⁵¹ Marquez, *supra* note 15, at 620.

¹⁵² See Daniel Stewart, *How do the States Regulate Restraint and Seclusion in Public Schools? A Survey of the Strengths and Weaknesses in State Law*, 34 HAMLINE L. REV. 531, 540 (2011).

¹⁵³ *Id.*

¹⁵⁴ U.S. DEPARTMENT OF EDUCATION, *supra* note 3, at 10.

¹⁵⁵ E.g., OHIO ADMIN. CODE 3301-35-15(A)(6) (2014).

¹⁵⁶ See Stewart, *supra* note 153, at 570.

¹⁵⁷ *Id.*; see, e.g., OHIO ADMIN. CODE 3301-35-15(A)(6) (2014).

¹⁵⁸ E.g., OHIO ADMIN. CODE 3301-35-15(A)(6) (2014).

diets that may include the use of physical contact.¹⁵⁹ A sensory diet is a method of providing “scheduled activities that give a person the input he or she needs to function in a ‘just right’ state (neither *overstimulated* or *understimulated*).”¹⁶⁰ A sensory diet may include the use of therapeutic wraps in a weighted blanket or deep pressure touch.¹⁶¹ Sensory diets can be an important preventative intervention to decrease negative and dangerous behaviors.¹⁶² For some students, sensory strategies are a part of the student’s FAPE (i.e., needed to obtain educational benefits),¹⁶³ and courts have upheld their use, as long as the force of physical contact used was proportionate to the need.¹⁶⁴

Therefore, if the use of therapeutic strategies were to fall under the definition of restraints and the restrictions that come along with it, it is likely that students needing these interventions would display increases in dangerous behaviors, making it more difficult to safely educate these students in a public school setting. In addition, this would be in conflict with the requirements of IDEA to provide students a FAPE in their LRE. By excluding brief physical contact and therapeutic interventions from the definition of physical restraint, regulations can address the practicalities of everyday school life without limiting school officials from using beneficial physical contact with students.

c. Prohibitions on Dangerous Types of Restraints

Due to the dangerous nature of some types of restraints, federal legislation should prohibit the use of these restraints under any circumstance.¹⁶⁵ There are three types of restraints that are frequently considered dangerous and, therefore, prohibited by an increasing number of states: prone restraints, mechanical restraints, and chemical restraints.¹⁶⁶ Prone restraints should be prohibited because they block a child’s ability to breathe.¹⁶⁷ Additionally, prone restraints are the type of restraint most frequently linked to death.¹⁶⁸

¹⁵⁹ *Sensory Diet and Classroom Modifications*, CTR. OF DEV. PEDIATRIC THERAPIES, <http://www.developmental-delay.com/page.cfm/286> (last visited Mar. 18, 2014).

¹⁶⁰ Lindsey Biel, *A Sensory Diet Happens 24/7*, AUTISM ASPERGER’S DIGEST (2011), available at <http://autismdigest.com/a-sensory-diet-happens-247/> (emphasis in original).

¹⁶¹ *Sensory Diet and Classroom Modifications*, *supra* note 160.

¹⁶² See, e.g., Biel, *supra* note 161.

¹⁶³ *Working with Schools from Raising a Sensory Smart Child*, SENSORYSMARTS, http://sensorysmarts.com/working_with_schools.html (last visited Mar. 18, 2015); see Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cnty. v. Rowley, 458 U.S. 176, 203 (1982); see also *supra* text accompanying notes 27–28.

¹⁶⁴ See OSBORNE, JR. & RUSSO, *supra* note 37, at 104.

¹⁶⁵ Mulay, *supra* note 3, at 369.

¹⁶⁶ BUTLER, *supra* note 6, at 29–30.

¹⁶⁷ *Id.* at 30.

¹⁶⁸ Allen, *supra* note 21, at 90.

Chemical and mechanical restraints should also be prohibited.¹⁶⁹ The discretionary use of chemical restraints should be prohibited because “schools should never use a drug or medication to control behavior or restrict freedom of movement unless it is (1) prescribed by a licensed physician . . . and (2) administered as prescribed by the licensed physician.”¹⁷⁰ When addressing mechanical restraints, “[s]chools should never use [a device or other equipment] to restrict a child’s freedom of movement.”¹⁷¹ This prohibition on mechanical restraints should exclude devices used for therapeutic or safety purposes, such as devices that actually improve mobility or improve sensory functioning.¹⁷² For example, therapeutic and safety devices include vehicle safety belts used for transporting students; medical immobilization restraints; and orthopedic, adaptive, and mechanical supports used to increase mobility.¹⁷³

Although there has been an increase in state law prohibiting dangerous types of restraints, such as prone restraints, as of January 2014, only twenty-one states had prohibitions applying to all children, with twenty-eight states having prohibitions for students with disabilities.¹⁷⁴ Therefore, federal regulations are needed to prohibit the use of dangerous restraints on students.

d. Restrictions on Use

Restrictions on use should be required to ensure the use of restraints is safe.¹⁷⁵ Safety measures include restricting restraints to situations of imminent danger when all other less restrictive measures have failed.¹⁷⁶ Only fourteen states, including Ohio, limit the use of physical restraints for all students to situations of imminent danger to self or others.¹⁷⁷ Due to a lack of consistent regulation, some states allow the use of physical restraints solely to prevent children from destroying property.¹⁷⁸ The need to protect school property should not exceed the need to protect students and staff from the risks associated with the use of restraints.¹⁷⁹ Therefore, restraints should only be used in this type of situation when the destruction of property

¹⁶⁹ BUTLER, *supra* note 6, at 29.

¹⁷⁰ U.S. DEPARTMENT OF EDUCATION, *supra* note 3, at 2.

¹⁷¹ *Id.* at 2, 10.

¹⁷² *E.g.*, OHIO ADMIN. CODE 3301-35-15(A)(3) (2014).

¹⁷³ U.S. DEPARTMENT OF EDUCATION, *supra* note 3, at 10.

¹⁷⁴ BUTLER, *supra* note 6, at 30.

¹⁷⁵ H.R. REP. NO. 111-417, at 2 (2010).

¹⁷⁶ BUTLER, *supra* note 6, at 25–26.

¹⁷⁷ *Id.* at 13. For students with disabilities, eighteen states restrict the use of restraints to imminent physical harm. *Id.*

¹⁷⁸ *Id.* at 14. For example, Nevada, Texas, West Virginia, Alaska, Iowa, Michigan, Montana, New York, Washington, and North Carolina allow the use of restraints for property destruction. *Id.*

¹⁷⁹ Joseph B. Ryan et al., *Review of State Policies Concerning the Use of Physical Restraint Procedures in Schools*, 32 EDUC. AND TREATMENT OF CHILDREN 487, 495–500 (2009), available at <http://www.ode.state.or.us/initiatives/elearning/nasdse/statepolicyphysicalrestraint.pdf>.

crosses the line by putting the student or others at risk of physical harm (e.g., pulling over a bookshelf, throwing chairs).

Additionally, “[p]hysical restraints [should] not be used for punishment or discipline” purposes.¹⁸⁰ Restraints are not an effective strategy to change student behavior.¹⁸¹ Due to the associated risks, restraints should never be used for minor infractions, such as defiance of teacher directives.¹⁸² Additional restrictions on use are important to ensure that restraints are only used as a last resort in crisis situations.¹⁸³ Thus, federal regulations should limit the use of physical restraints to situations involving imminent harm to the student or others.

e. Preventative Measures

Regulations should require states to implement preventive measures for dealing with challenging student behaviors.¹⁸⁴ Preventative measures that have been shown to decrease challenging behaviors include system-wide PBIS and individual behavior intervention plans (“BIP”).¹⁸⁵

The goal of PBIS is to implement system-wide strategies to increase positive behaviors, thereby decreasing negative behaviors that can lead to the use of restraints.¹⁸⁶ Although school-wide PBIS has been shown to improve student behavior, some students with highly challenging behaviors, likely those with behavioral disorders, will need individualized behavioral supports at the tertiary level.¹⁸⁷ These supports should be provided through individualized BIPs based on functional behavior assessments (“FBA”).¹⁸⁸

FBA is needed to determine the function of the student’s behavior by identifying the individual needs of the student and the triggers for inappropriate behavior.¹⁸⁹ Using the information obtained from the FBA, preventative strategies can be put into place to address the student’s needs through socially appropriate alternative behaviors.¹⁹⁰ Furthermore, the BIP provides staff with strategies to use when inappropriate behavior does

¹⁸⁰ OHIO ADMIN. CODE 3301-35-15(D)(3) (2014).

¹⁸¹ Stewart, *supra* note 153, at 577.

¹⁸² *See id.* at 558–59.

¹⁸³ Marquez, *supra* note 15, at 634.

¹⁸⁴ *See* U.S. DEPARTMENT OF EDUCATION, *supra* note 3, at 12; *see also* Stewart, *supra* note 153, at 566.

¹⁸⁵ Suzanna E. Eckes and Sarah B. Burke, *Are Positive Behavioral Interventions Effective at Reducing Misbehavior in Students with Behavioral Disorders? Overview*, in 5 SCHOOL DISCIPLINE AND SAFETY 232–33 (Suzanne E. Eckes & Charles J. Russo eds., 2012).

¹⁸⁶ U.S. DEPARTMENT OF EDUCATION, *supra* note 3, at 25; Couvillon, *supra* note 4, at 6–17.

¹⁸⁷ Theresa A. Ochoa, *Are Positive Behavioral Interventions Effective at Reducing Misbehavior in Students with Behavioral Disorders? Point*, in 5 SCHOOL DISCIPLINE AND SAFETY 238 (Suzanne E. Eckes & Charles J. Russo eds., 2012).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

occur.¹⁹¹ Preventative strategies provided through a BIP, such as changes to the environment and teaching appropriate replacement behaviors, can reduce the occurrence of challenging behaviors.¹⁹² For students who continue to display challenging behaviors despite preventative measures, specific de-escalating strategies provided through a crisis plan are needed to reduce the severity of dangerous behaviors,¹⁹³ thereby reducing the use of physical restraints.

Another important prevention method includes the training and professional development of school staff.¹⁹⁴ When staff members are trained in the appropriate use of physical restraints, students are less likely to be injured.¹⁹⁵ Additionally, trained staff members are more likely to restrict the use and scope of restraints to only the amount needed.¹⁹⁶ Although preventative measures are unlikely to ever completely eliminate all challenging behaviors, implementation of PBIS and professional development are important pieces of the puzzle to reduce challenging behaviors, thereby reducing the number of crisis situations and the need to use restraints.¹⁹⁷

f. Notification Procedures

Notification procedures should be required to inform administrators and parents of the use of restraints.¹⁹⁸ Regulations should require notification of all incidents that involve the use of a restraint on a child to a district administrator.¹⁹⁹ Parents should also receive immediate notification.²⁰⁰

Appropriate notification helps to prevent the overuse of restraints.²⁰¹ By notifying administrators of each time a restraint is used, administrators can help protect students from staff who may be too quick to use restraints or who fail to use them appropriately.²⁰² Notification to administrators and parents may also help to identify when the placement of a student with a disability is not providing a FAPE.²⁰³ Frequent use of restraints on a student

¹⁹¹ LAURA A. RIFFEL, WRITING BEHAVIOR INTERVENTION PLANS (BIP) BASED ON FUNCTIONAL BEHAVIOR ASSESSMENTS (FBA): MAKING DATA BASED DECISIONS TO CHANGE BEHAVIOR 10 (2007), available at http://couragetorisk.org/2010_handouts/Riffel_Finding_the_Function_Behind_the_Behavior.pdf (including “[m]anaging consequences to reinforce desired behaviors and replacement skills” and “[w]ithhold[ing] reinforcement following problem behavior”).

¹⁹² *Id.*

¹⁹³ *Id.* at 14.

¹⁹⁴ Stewart, *supra* note 153, at 537.

¹⁹⁵ OSBORNE, JR. & RUSSO, *supra* note 37, at 104.

¹⁹⁶ *Id.*

¹⁹⁷ McKeown, *supra* note 148, at 228.

¹⁹⁸ *E.g.*, OHIO ADMIN. CODE 3301-35-15(F) (2014).

¹⁹⁹ Ryan, *supra* note 180, at 502; *see also* OHIO ADMIN. CODE 3301-35-15(F) (2014).

²⁰⁰ McKeown, *supra* note 148, at 228.

²⁰¹ *Id.* at 228–29.

²⁰² *Id.* at 225.

²⁰³ *See id.* at 213.

may be an indication that the child is unable to receive FAPE in his current placement and IEP team needs to reconsider his LRE.²⁰⁴ Additionally, immediate notification to parents allows the parent to monitor the child following the incident.²⁰⁵ For these reasons, federal regulations should require states to include notification to district administrators and parents immediately following any use of restraint.

g. Use of Restraints in IEPs and BIPs:

An area of disagreement revolves around the question of whether the use of restraints should be included in a student's IEP or BIP.²⁰⁶ The proposed House bill, H.R. 927, prohibits including the use of restraints in a student's IEP or BIP, while the previously proposed Senate bill, S. 2036 allowed it, as long as certain preventative measures had been put into place and the state allowed it.²⁰⁷ Those that support the view taken in H.R. 927 argue that including restraints in a student's IEP indicates the use is no longer for an emergency and allows courts to rule that excessive use is permissible.²⁰⁸

However, opponents of the prohibition claim that inclusion of a restraint plan in an IEP protects a student by allowing school personnel and parents to discuss any concerns or medical needs that may impact how a school responds in a crisis situation requiring the use of restraints.²⁰⁹ By including the steps to be taken during a crisis situation in a student's IEP, staff members are accountable for following the crisis plan and parents stay informed.²¹⁰ Additionally, just because a parent consents to the use of aversive strategies in an IEP or BIP does not prohibit the parent from asserting a constitutional violation due to inappropriate use of aversive strategies.²¹¹

Due to these benefits, federal regulations should not prohibit states from choosing to include the use of restraints in an IEP, BIP, or crisis plan. Instead, this decision should be left to the states. On the other hand, federal regulations should prohibit states from including loopholes in the law that allow IEP teams to negate state laws on the use of restraints.²¹² Regulations exist to protect students from dangerous use of physical restraints, and IEP teams should not be allowed to evade safety standards.

²⁰⁴ *See id.*

²⁰⁵ Miller, *supra* note 150, at 407.

²⁰⁶ Mulay, *supra* note 3, at 363.

²⁰⁷ Compare Keeping All Students Safe Act, S. 2036, 113th Cong. (2014), with Keeping All Students Safe Act, H.R. 927, 114th Cong. (2014).

²⁰⁸ *See* Mulay, *supra* note 3, at 363–64.

²⁰⁹ PUDELSKI, *supra* note 36, at 11.

²¹⁰ *Id.*

²¹¹ *Peters v. Rome City Sch. Dist.*, 747 N.Y.S.2d 867, 870 (N.Y. App. Div. 2002).

²¹² *See, e.g., BUTLER*, *supra* note 6, at 14, 42 (allowing IEP teams to circumvent state restraint and seclusion laws).

As indicated above, federal oversight is needed to provide safety standards to keep all students safe when restraints are needed in crisis situations. The recently passed Ohio regulations provide comprehensive protections and serve as a model for federal legislation.

IV. CONCLUSION

Public schools are faced with many challenges every day. One of those challenges is the need to keep schools safe in the age of inclusion. Due to the fact that crisis situations occur with students with behavioral needs, school officials will occasionally need to use physical restraints to keep students and staff members safe.

Ohio's restraint regulations serve as a model for the needed components of federal legislation, as well as for other states looking to protect our children and staff in today's public schools. It is time for Congress to work together and pass bipartisan legislation for the use of restraints in schools so that all the students and educators in our nation's schools are afforded the protections they deserve.

